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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, A. D. 1929.**

**No. 375**

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WESTERN CARTRIDGE COMPANY, A CORPORATON,
*Petitioner,*

VS.

LOUIS L. EMMERSON, (WILLIAM J. STRATTON)
SECRETARY OF STATE OF THE STATE OF ILLINOIS,
*Respondent.*

---

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PHILLIPS BROS.' PRINT.
SPRINGFIELD, ILLINOIS.

(24961—75)

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### STATEMENT OF THE CASE.

This case involves the right of the State of Illinois to impose an annual license fee or franchise tax upon a foreign corporation for the privilege of doing business in that State during the year commencing July 1, 1927. The opinion of the Supreme Court of Illinois, in rendering the judgment sought to be reviewed here, is reported in 335 Ill., 150 (Advance Sheets). See also, R. 16-22.

The license fee or tax was computed upon the pro-

portion of the issued capital stock represented by business transacted and property located in Illinois, as provided by Section 105 of the General Corporation Act of that State. The bill of complaint shows that the corporation had issued capital stock in the par value amount of $5,701,800, and that the total amount of its property was $6,924,804.92, nearly all of which was located in Illinois, and all of its business was transacted in that State. The fee or tax computed upon the proportion of capital stock represented by such property and business amounted to the sum of $2,808.03 (R. 1).

The cause was heard upon the bill and answer and a stiuplation on a statement of facts by the petitioner. This statement showed that the petitioner is engaged in the manufacture and sale of small arms, ammunition and brasses. Both its offices and factories are located in Illinois, and all of its goods are manufactured at such factories in that State. Orders or offers for the purchase of such goods are received by it at its office in East Alton, Illinois, and accepted at that office, and the goods are then packed and shipped from its factories in Illinois to the purchasers in that and other states (R. 8-9).

The bill and statement alleged that $1,919,882.73, or about one-sixth of the total amount of sales were of goods sold and shipped to residents of Illinois, and the remainder of the goods sold were shipped to points outside of the State. The petitioner contended that the sale of goods to purchasers outside of the State consti-

tuted interstate commerce and that such business could not be considered in computing its tax. The Secretary of State, however, considered all such sales as part of the business transacted in Illinois, in determining the proportion of the capital stock represented by business transacted and property located in that State (R. 6-8).

Upon the hearing, the trial court sustained the position of the Secretary of State and dismissed the bill of complaint for want of equity. An appeal was taken by the petitioner to the Supreme Court of Illinois, which affirmed the decree of the lower court, pursuant to the prior decision of that Court and of this Court in the case of *Hump Hairpin Mfg. Co.* vs. *Emmerson*, 258 U. S., 290, and other cases. A petition for rehearing was denied by that Court on June 6, 1929, and the petitioner now seeks by its petition to have that decision reviewed by this Court (R. 10, 15-25).

The petitioner here urges only that the inclusion of the alleged interstate commerce consisting of the sale of goods manufactured and sold in Illinois to purchasers in other states, in computing its annual license fee or franchise tax, constituted a direct and substantial burden on its interstate commerce, contrary to the commerce clause of the Federal Constitution. This contention is admittedly contrary to the decision of this Court in the *Hump Hairpin* case, supra, but it is further contended that such decision is modified or overruled by certain later decisions of this Court.

The position of respondent is that the license fee or tax imposed upon the petitioner did not constitute a direct or substantial burden upon any interstate commerce, and that the decision of the Supreme Court of Illinois, pursuant to the decision of this Court in the *Hump Hairpin* case, is correct, and that such decision is not in any way modified or overruled by any of the later decisions of this Court.

## POINTS AND AUTHORITIES.

### I.

The computation of the annual license fee or franchise tax upon the proportion of issued capital stock represented by property located and business transacted in Illinois, including sales of goods manufactured and sold at places of business in that state, did not impose any direct or substantial burden on interstate commerce, contrary to the commerce clause.

General Corporation Act, Ill. Rev. Stat., Chap. 32, Sec. 105;
*Hump Hairpin Mfg. Co.* vs. *Emmerson*, 258 U. S., 290, 294-5;
*Underwood Typewriter Co.* vs. *Chamberlin*, 254 U. S., 113;
*U. S. Glue Co.* vs. *Oak Creek*, 247 U. S., 321;
*Kansas Citq, etc., R. R. Co.* vs. *Stiles*, 242 U. S., 111;
*Kansas City, etc., R. R. Co.* vs. *Botkin*, 240 U. S., 227;
*St. Louis S. W. Ry. Co.* vs. *Arkansas*, 235 U. S., 350;
*International Shoe Co.* vs. *Shartel*, 279 U. S., 429, 433.

The petitioner is a manufacturing corporation, with both of its offices and factories in Illinois. All of its business is transacted at such places of business in Illinois, and nearly all of its property is located in that State. The small portion of its property outside the State was not considered in computing its tax.

The business of petitioner did not consist merely in the sale and final disposition of its goods, but included the use of its large amount of property in Illinois in manufacturing such goods, the receipt and acceptance of orders or offers for such goods at its offices in that State, and the shipment of such goods from its factories there to various points in that and other states. Such business was therefore transacted entirely in Illinois, and only the final delivery of part of the goods outside of that State had any element of interstate commerce.

The assumption that any business which has some element or feature of interstate commerce cannot be considered in computing a franchise tax is not in accordance with the decisions of this Court. On the contrary, an excise or franchise tax has been repeatedly upheld, where business which had some feature of interstate commerce, or the proceeds of such business, have been used as one of the elements in determining the amount upon which such a tax may be computed. In the case of *Hump Hairpin Mfg. Co.* vs. *Emmerson*, 258 U. S., 290, after citing several cases which upheld that proposition, this Court said, at pages 294-5:

> "The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact, distantly affect it."

The facts in that case were substantially the same as the facts in the present case The Court there pointed out that the tax was not imposed directly upon the proceeds of interstate commerce, but that the amount of interstate sales was only one of three factors used, the other two factors being the large amount of property used in Illinois, and the proceeds from sales to residents of that State. It was further held that the fee or tax was reasonable in amount, and that if the same amount of tax had been imposed upon such a manufacturing corporation, for the privilege of doing business in the State, without reference to the basis of computation, or if it had been imposed as an income tax, a part of which would have been derived from the net profits on such business, no valid objection could have been made to it. At the most, it was held that the assessment, so far as interstate commerce was concerned, was incidental, remote and unimportant and that it was therefore constitutional and valid.

This decision expressly sustained the prior decisions of the Supreme Court of Illinois in that and other cases, and is directly in point here, as shown by the opinion of that Court in the present case (R. 16-22). That Court therefore properly held that the former case is decisive and sustained the validity of the statute and the amount of tax assessed in the present case.

The petitioner here, as in the State Court, urges that the prior decisions of this Court in the *Hump Hairpin* case have been in effect overruled by subsequent decisions of this Court. It seems apparent that none of the decisions in the cases mentioned are applicable here. In the *Western Union* and *Pullman* cases involving the Kansas statute, *Looney* vs. *Crane Co.* case on the Texas statute and the *International Paper Company* case involving the amended Massachuetts statute, those states sought to impose a franchise tax measured by the entire authorized capital stock of foreign corporations having a large amount of interstate commerce and property in other states, which this Court held imposed a substantial burden on interstate commerce and taxed property in such other states.

In the *Airway* case, the State of Ohio sought to impose a franchise tax measured by a large amount of authorized capital stock of no par value, nearly seven-eighths of which had not been issued and which the Court held did not represent any property or business of the corporation anywhere. In the *Cudahy Packing Company* case, the statute likewise sought to impose a franchise tax measured by authorized capital stock, a substantial part of which was unissued.

It is apparent that none of these cases has any application to the present case. They are distinguishable from the basis on which the tax here is assessed, as held

by this Court in the case of *International Shoe Co.* vs. *Shartel,* supra, on the ground that the tax in those cases was measured by authorized instead of issued capital stock, or was not limited to that part of the capital stock justly apportioned to the taxing state on account of property located and business transacted in such State.

The statement quoted from the opinion in *the Alpha Portland Cement Company* case, has no reference whatever to the decision in the *Hump Hairpin* case, but refers only to language used in the case of *Baltic Mining Co.* vs. *Mass.,* 231 U. S., 68, at 87, where a tax measured by the entire authorized capital stock of a foreign corporation, which had a large amount of property and business in other states, was upheld on the ground that the statute limited the tax to a maximum amount. This limitation had no effect on corporations having a capital stock of less than $10,000,000 and the later case held that it did not provide a proper basis for computing the tax against such corporations. The statement mentioned obviously can have no application or reference to the *Hump Hairpin* case.

II.

The rule adopted by this Court is that while the State may not regulate or impose a burden upon interstate commerce, it may levy a tax within its authority, measured by the capital stock in part used in such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

*Hump Hairpin Mfg. Co.* vs. *Emmerson,* 258 U. S., 290;
*Underwood Typewriter Co.* vs. *Chamberlin,* 254 U. S., 113;
*St. Louis Southwestern Ry. Co.* vs. *Arkansas,* 235 U. S., 350;
*Chaney Bros. Co.* vs. *Mass.,* 246 U. S., 147;
*U. S. Glue Co.* vs. *Oak Creek,* 247 U. S., 321;
*Northwestern Life Ins Co.* vs. *Wisconsin,* 247 U. S., 132;
*Peck & Co.* vs. *Lowe,* 247 U. S., 165;
*Maine* vs. *Grand Trunk Ry. Co.,* 142 U. S., 217;
*Wisconsin, etc., Ry. Co.* vs. *Powers,* 191 U. S., 379;
*Flint* vs. *Stone Tracy Co.,* 220 U. S., 107;
*United States Express Co.* vs. *Minnesota,* 223 U. S., 335;
*Kansas City, Ft. S. & M. Ry. Co.* vs. *Kansas,* 240 U. S., 227;
*Kansas City, M. & B. R. R. Co.* vs. *Stiles,* 242 U. S., 111;
*Gilliland Oil Co.* vs. *State,* 274 U. S., 717.

In the *Hump Hairpin* case, *supra,* this Court referred to the case of *American Can Co.* vs. *Emmerson,* 288 Ill., 289, in which the Supreme Court of Illinois held that it has been the policy of that State since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character, and that the fees for

transacting business in the State were computed on the amount of capital stock of foreign corporations actually represented by property located and business transacted in the State, as determined by the Secretary of State under the statute.

In referring to those cases in the instant case, the Supreme Court of Illinois in its opinion shows that the fee or tax under the present statute is computed on exactly the same basis as provided by the prior statute, and that therefore such decisions are directly applicable to the present case. Both the statute and the decisions of the Supreme Court sustain the same principles that were applied and approved in those cases.

In the petition herein, the use of a large amount of property in carrying on its business in Illinois is ignored by the petitioner. As pointed out by the Court in the *Hump Hairpin* case, if the tax were computed only on the property admitted to have been used in the State, it would have been but slightly less than the amount collected. In the present case, it would exceed the amount collected, as the amount of property used in the State exceeds the total par value amount of the capital stock of the corporation.

The petition herein compares the result of the formula said to be used by the Secretary of State with the result which would be obtained if only the amount of sales made within the State were included. The petitioner thus ignores the business carried on by it in its

manufacturing operations, making contracts for sales and shipment of goods, all of which are carried on at its places of business in the State. The omission of such business of course leads to an incorrect result and renders the comparison valueless.

This Court considered all of the facts involved in carrying on such a business in the *Hump Hairpin* case, and held that under such facts, the tax involved was valid, even though that part of the business consisting of sales to residents of other states be regarded as interstate business. It was further held that the statute clearly is not a disguised attempt to tax interstate commerce and does not have that effect, but only requires foreign corporations to pay a reasonable fee for the privilege of doing business in the State.

This decision is sustained by many other decisions of this Court in similar cases. The Court referred especially to *U. S. Glue Co.* vs. *Oak Creek*, 247 U. S., 321, as supporting its decision. A tax was there imposed upon the proportion of income which was derived from business transacted and property located within the State. It was contended that the part of the tax imposed upon income derived from goods sold and shipped to persons in other states was a burden upon interstate commerce, but the Court held that such a tax could not be deemed so direct a burden as to render it invalid.

In the case of *Underwood Typewriter Co.* vs. *Chamberlin*, 254 U. S., 113, a tax was computed upon the proposition of the whole net income of a foreign corporation

which the value of its tangible property in the State bore to all of its property everywhere. All its manufacturing was done in the State and under this formula 47% of its profits were allocated to that State, although only a little over 3% of such profits were made from sales in that State. The Court held that such profits were earned largely by the use of property within the State and that a tax measured by such profits was entirely valid, even though derived in part or mainly from interstate commerce.

In the recent case of *Gilliland Oil Co.* vs. *Arkansas*, 274 U. S., 717, this Court in a *per curiam* opinion approved the decision of the Arkansas Supreme Court on the authority of the *Underwood Typewriter Company* case and other cases. The statute there imposed a tax measured by the proportion of no par value capital stock taken at $25 per share represented by property owned and business transacted in the State. It was stipulated in the record in that case that more than 50% of the products of the corporation in the State were sold and transported by it in interstate commerce and it was contended that the inclusion of the amount of such sales in computing the tax imposed a burden upon interstate commerce, but the Court held that it did not have that effect.

The recent decision of this Court in *International Shoe Co.* vs. *Shartel*, 279 U. S., 429, likewise in effect

sustains the decision in the present case. A large number of cases are cited at page 433 in that case, in support of the principle here involved, and certain other cases which are relied on by the petitioner here, are distinguished as involving statutes which imposed a tax on a different basis.

The provisions of the statute here involved, as construed and applied by the Supreme Court of Illinois in the present case, have been directly approved and upheld by this Court in the *Hump Hairpin* case. That decision and the principles there stated have never been overruled or questioned in any later case, but have been sustained and applied in many prior and subsequent cases. As there stated, the principle involved in such cases has been so repeatedly sustained that it must be regarded as the settled law, and it should be applied in all subsequent cases of the same character. It is therefore urged that the petition herein be denied.

Respectfully submitted,

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